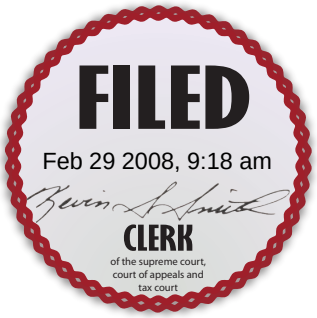
APPELLANT PRO SE:

DEMONN CARTER
Carlisle, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

RICHARD C. WEBSTER
Deputy Attorney General
Indianapolis, Indiana



IN THE
COURT OF APPEALS OF INDIANA

DEMONN CARTER,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 49A05-0610-PC-618
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Sheila A. Carlisle, Judge
The Honorable William Robinette, Master Commissioner
Cause No. 49G03-0005-PC-71949

February 29, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Demonn Carter appeals the denial of his petition for post-conviction relief. We affirm.

Issues

Carter raises four issues, which we rephrase as follows:

I. Whether the post-conviction court properly refused Carter's request to issue subpoenas;

II. Whether the court erred by denying Carter's request for stand-by counsel;

III. Whether the findings and conclusions are sufficient; and

IV. Whether Carter received effective assistance of trial and appellate counsel.

Facts and Procedural History

In our 2001 decision addressing Carter's appeal of his murder conviction and the finding of habitual offender status, we set out the facts as follows:

> On April 25, 2000, Carter arrived at Wishard Hospital with the body of his girlfriend, Tomica Stewart. Dr. Julia Wilson examined Stewart in the emergency room and determined that she had been dead somewhere between four and twenty-four hours. Dr. John Pless performed an autopsy on Stewart. Pless testified:
>
> > There were blunt force injuries to the head and face, there were cutting or incised wounds of the inside of the right mouth, of the lip and the left neck, and there were contusions or bruises of the front side of the neck, as well as hemorrhages in the larynx, which were also associated with petechia on the face, indicating a strangulation.
>
> Tr. at 144.
>
> After Carter arrived at the hospital with Stewart's body, he received treatment for a wound to his right hand. Sergeant Michael Turner of the Marion County Sheriff's Department was dispatched to Wishard Hospital to investigate Stewart's death. Turner, along with Detective Steve Gibbs, spoke to Carter in one of the recovery rooms. When asked "[w]as Mr. Carter free to leave when he walked in that door," Turner stated, "Yes." *Id*. at 10. During

this time, Carter was asked various questions about his relationship with Stewart. Additionally, Turner testified:

> He [Carter] was being treated for his injuries. I think I asked him what happened to his hand. He told me he had punched out the window to get into the vehicle and had driven it to the hospital. We took some pictures of his injuries. From that point we asked him if he would take us back to their [Carter and Stewart's] apartment—they still lived together—if he would take us back to their apartment, and he said yes.

Id. at 11. Turner testified that he wanted to search Carter and Stewart's apartment because Carter was a suspect in the investigation and Stewart lived there, "so that's a thing that we would do." *Id*. at 15.

Prior to the search of his apartment, Carter signed a "**PERMISSION TO SEARCH (Not In Custody)**" form. (State's Exhibit 42) (emphasis supplied). The bottom of this form states: "THIS PERMISSION IS GIVEN KNOWINGLY AND VOLUNTARILY UPON FULL KNOWLEDGE OF MY RIGHT TO REFUSE SUCH PERMISSION." (State's Exhibit 42) (emphasis supplied). During the search of his apartment, four (4) or five (5) officers looked around while Carter sat at his kitchen table and made telephone calls. After the officers finished searching the apartment, Carter was asked if he was willing to go downtown and take a polygraph examination. Carter agreed to take a polygraph examination. …

After the polygraph examination, Turner continued to question Carter. At some point during this continued interrogation, Carter asked Turner if he could leave. Carter was allowed to leave at that time.

On May 2, 2000, a warrant was issued for Carter's arrest. Arrangements were made through the Indianapolis Police Department to have Carter surrender himself. Carter was picked up at his grandmother's house. Turner and Lieutenant Christopher Heffner took Carter to the jail. On their way to the jail, Turner testified that Carter "tried to make a couple of comments that we were basically, 'Just wait until we get downtown and we'll talk when we get down there.'" (R. 24).

Upon their arrival at the jail, Carter was taken to an interview room. Heffner then advised Carter of his rights. …

After [Carter] signed the Waiver of Rights form, Heffner proceeded to interview Carter. … Heffner went into the interview room and immediately began questioning Carter on videotape.

Heffner testified that, during the interview, Carter:

> stated the he had been in an argument with Ms. Stewart and at some point she had picked up a knife and was swinging it at him, and he was able to position himself to where he could, for

> lack of a better term, choke her, put her in a head lock to keep her from cutting or stabbing him.

(R. 325). Furthermore, Heffner testified:

> Well, initially when I asked him about it, he said that he slammed her body into the floor, and I asked him if he went down with her, and his initial response was yes, and then the second time I asked him he said no. And he said that must have been that's how she got stabbed. Then I asked him again later on in the conversation, and he stated that he had poked her a couple of times to make it look like someone had attacked her.

(R. 326). …

> On May 3, 2000, the State filed an information against Carter, charging him with murder, a felony, Ind. Code § 35-42-1-1. On July 17, 2000, the State filed an additional information, alleging Carter to be an habitual offender, Ind. Code § 35-50-2-8.
>
> [Carter attempted to suppress his statements.] A bench trial was held on February 26-27, 2001. Prior to the commencement of trial, the court [denied] Carter's motions to suppress. …
>
> On February 28, 2001, the trial court found Carter guilty of murder. The trial court also found Carter to be an habitual offender. On April 20, 2001, a sentencing hearing was held. Carter received a total executed sentence of eighty (80) years in the Department of Correction.

Carter v. State, No. 49A04-0150-CR-186, slip op. at 2-6 (Ind. Ct. App. Dec. 19, 2001). On appeal, Carter, represented by counsel, argued that the trial court abused its discretion in denying his motions to suppress his statements. We disagreed and affirmed the trial court. Our supreme court denied transfer.

On February 11, 2003, Carter filed a pro se petition for post-conviction relief. The State Public Defender's Office was appointed to represent Carter, but found no merit in his case and consequently withdrew from representation. On May 10, 2005, Carter filed an amended petition for post-conviction relief alleging ineffective assistance of trial and appellate counsel as well as abuses of discretion by the court. He also requested that the State Public Defender's Office be re-appointed to act as "stand-by counsel" and that the court

issue eleven subpoenas. With the exception of issuing two subpoenas, the court denied Carter's requests. Over the course of five days spread out over several months, the court held evidentiary hearings regarding Carter's allegations. On September 27, 2006, more than five months after the last day the court heard evidence, it entered a twenty-plus-page order denying Carter's petition for post-conviction relief.

Discussion and Decision

Standard of Review

At the outset, we note that pro se litigants, such as Carter, "are held to the same standard as trained counsel and are required to follow procedural rules." *Evans v. State*, 809 N.E.2d 338, 344 (Ind. Ct. App. 2004), *trans. denied*. "This has consistently been the standard applied to pro se litigants, and the courts of this State have never held that a trial court is required to guide pro se litigants through the judicial system." *Id.*

This is an appeal from the denial of post-conviction relief.

> The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5). When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. On review, we will not reverse the judgment unless the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court. *Id*. Further, the post-conviction court in this case entered findings of fact and conclusions of law in accordance with Indiana Post-Conviction Rule 1(6). "A post-conviction court's findings and judgment will be reversed only upon a showing of clear error – that which leaves us with a definite and firm conviction that a mistake has been made." *Ben-Yisrayl* [v. State], 729 N.E.2d [102, 106 (Ind. 2000)] (quotation omitted). In this review, findings of fact are accepted unless clearly erroneous, but no deference is accorded conclusions of law. *Woods v. State*, 701 N.E.2d 1208, 1210 (Ind. 1998). The post-conviction court is the sole judge of the weight of the evidence and the credibility of witnesses.

Fisher v. State, 810 N.E.2d 674, 679 (Ind. 2004) (some citations omitted). Moreover,

> Post-conviction procedures do not afford a petitioner with a "super-appeal." *See, e.g., Timberlake v. State*, 753 N.E.2d 591, 597 (Ind. 2001). Rather, subsequent collateral challenges must be based on grounds enumerated in Post-Conviction Rule 1. If an issue was known and available on direct appeal, but not raised, it is procedurally defaulted as a basis for relief in subsequent proceedings. *See, e.g., Rouster v. State*, 705 N.E.2d 999, 1003 (Ind. 1999). If an issue was raised on appeal, but decided adversely, it is res judicata. *Id*. If the issue is not raised on direct appeal, a claim of ineffective assistance of trial counsel is properly presented in a post-conviction proceeding, but as a general rule, "most free-standing claims of error are not available in a postconviction proceeding because of the doctrines of waiver and res judicata."

Williams v. State, 808 N.E.2d 652, 659 (Ind. 2004).

I. Denial of Motion to Issue Subpoenas

In a June 10, 2005 order denying Carter's motion for nine[1] of eleven subpoenas, the post-conviction court found that the "Record of Proceedings is the best evidence of events at trial, [Carter] has not shown how their testimony is relevant to his claims, and [Carter] is not entitled to a retest of the State's evidence." PCR App. at 192. Carter claims this denial deprived him of his right to due process of law. Appellant's Br. at 4, 5. He focuses primarily on two witnesses: Dr. John Pless and Dr. Mark Peters, whose testimony Carter claims would have been helpful to "satisfy his burden" regarding "another possibility of death: aspiration of gastric contents." *Id*. at 6. He asserts that his counsel should have explored medical testimony. He makes only cursory mention of the other witnesses who were not subpoenaed.

[1] The post-conviction court granted Carter's request to issue a subpoena to his trial counsel and another to his appellate counsel. Indeed, both attorneys testified at the post-conviction hearing.

He contends that they would have testified regarding the victim's character and reputation for violence, which would have been "pertinent to a claim of self-defense." *Id*. at 7.

In resolving this issue, we note that it is within the post-conviction court's discretion to grant or deny a party's request for a subpoena. *Allen v. State*, 791 N.E.2d 748, 756 (Ind . Ct. App. 2003), *trans. denied*. We review the court's decision regarding whether to issue a subpoena for an abuse of discretion. *Stevenson v. State*, 656 N.E.2d 476, 478 (Ind. 1995). An abuse of discretion occurs where the court's decision is against the logic and effect of the facts and circumstances before the court. *Allen*, 791 N.E.2d at 756.

Pursuant to Post-Conviction Rule 1(9)(b):

> If the pro se petitioner requests issuance of subpoenas for witnesses at an evidentiary hearing, the petitioner shall specifically state by affidavit the reason the witness's testimony is required and the substance of the witness's expected testimony. If the court finds the witness's testimony would be relevant and probative, the court shall order that the subpoena be issued. If the court finds that the proposed witness's testimony is not relevant and probative, it shall enter a finding on the record and refuse to issue the subpoena.

The autopsy report for Stewart includes "aspiration of gastric contents" as one of four "anatomic findings." Exh. F; PCR Tr. at 51; App. at 429. The other three anatomic findings are blunt force injuries of head, incised wounds of head and neck, and contusions of anterior neck. *Id.* Aspiration of gastric contents is not listed as the cause of death. Rather, the same report clearly lists the "cause of death" as "Manual Strangulation and Incised Wound of Neck." *Id.* Of note, the cause of death is written in the conjunctive rather than the disjunctive. That is, there is no "or," which might indicate uncertainty or disagreement. In addition, given that both Dr. Pless and Dr. Peters signed the report, we fail to see how there

could be a dispute about the cause of death, let alone how such a nonexistent dispute could have been unearthed during post-conviction proceedings. To the extent Carter tries to rely upon the probable cause affidavit to indicate a dispute, he is mistaken, as it is not evidence. Besides, it too alleges "strangulation" as the cause of death, which is hardly inconsistent with the "strangulation" noted in the autopsy. Moreover, Dr. Pless testified at the original trial and, from what we can gather, discussed the strangulation and the report's findings and ultimate conclusion. *Carter*, slip. op. at 2. Carter has not demonstrated that the post-conviction court abused its discretion when it denied his request to issue a subpoena for each of the two doctors.

Regarding the other seven witnesses, two of them testified at the post-conviction hearing despite not being subpoenaed (Carter's mother, Monica Armour, and his brother, Warren Carter). Two of the others, Vicki and Tracey Stewart, relatives of the victim, testified at Carter's original trial. Carter wanted Bart Krepps, his parole officer, subpoenaed to verify that Carter had a "legal right to be where he was at," and therefore "prove" one element of self-defense. PCR App. at 162. However, there is no indication that a dispute existed as to whether Carter was in a place where he had a right to be. Carter wanted Larry Bowers of the Department of Pathology subpoenaed to "validate the toxicology report that was made on the victim and to elaborate on the amount of T.H.C. and Carboxyl found in the victim's system; that was not exposed at" Carter's trial. *Id*. at 165. Yet, Carter did not indicate why such testimony might have been relevant.

Finally, Carter wanted Deputy Cory Nash subpoenaed to "validate a report that he made on the victim, showing [her] reputation in the community." *Id*. at 168. Indiana Evidence Rule 405 permits proof of a victim's violent character by reputation or opinion testimony, not by prior bad acts. Direct testimony of prior bad acts to show a victim's violent propensities is permissible only on cross-examination of a character witness. Ind. Evidence Rule 405(a). Accordingly, Carter would not have been permitted to elicit such testimony from Deputy Nash; that is, such evidence would not have been admissible at the post-conviction hearing. Carter has not demonstrated that the post-conviction court's decision, denying his requests for issuance of certain subpoenas, was against the logic and effect of the facts and circumstances before the court. That is, Carter has not shown an abuse of discretion.

II. Denial of Motion for Stand-by Counsel

To recap, although originally appointed to represent Carter, the State Public Defender's Office found no merit in his case and consequently withdrew from representation. Thereafter, Carter filed an amended petition for post-conviction relief in which he made new allegations and requested that the State Public Defender be re-appointed to act as "stand-by counsel." The court did not grant this request. Carter acknowledges that he has no constitutional right to counsel during the post-conviction process. Appellant's Br. at 8-9. However, he asks that we interpret Indiana Post-Conviction Rule 1(4)(e) to provide him with the continuing right to representation from the State Public Defender. *Id*. at 7.

Indiana Post-Conviction Rule 1(4)(e) provides:

> In the event that counsel for petitioner files with the court a withdrawal of appearance accompanied by counsel's certificate, see Section 9(c), the case shall proceed under these rules, petitioner retaining the right to proceed pro se in forma pauperis if indigent. Thereafter, the court *may* order the State Public Defender to represent an indigent incarcerated petitioner *if* the court makes a preliminary finding that the proceeding is meritorious *and* in the interests of justice.

(Emphases added). The language in the last sentence of the rule is clearly permissive, not mandatory. That is, if the court makes a preliminary finding that the proceeding would be meritorious and in the interests of justice, the court may, but is not required to, order the State Public Defender to represent the petitioner.

Carter asserts that his issues were meritorious as "demonstrated by the fact that the trial court found that the issues necessitated several hearings," and that his amended petition was not dismissed, summarily denied, or deemed frivolous. Appellant's Br. at 8. Carter is mistaken. Our review of the materials leads us to conclude that the multiple hearings were needed because Carter was proceeding pro se. That is, often rules and law had to be explained and rehashed, which slowed the process. Moreover, just because a case survives summary disposition and/or is not deemed frivolous does not mean it ultimately has merit.

We have said, "[t]he purpose of the requirement affording the public defender time to *investigate and possibly amend* the petition under P-C.R. 1(2), (3) and (4) is to insure representation of indigent petitioners and to promote judicial economy by presenting all known allegations of error in the original petition." *Hamilton v. State*, 618 N.E.2d 52, 54 (Ind. Ct. App. 1993) (emphasis added). It is the best way of rendering successive petitions unnecessary. *See Holliness v. State*, 496 N.E.2d 1281, 1282 (Ind. 1986). Here, the State

Public Defender's Office examined Carter's petition, found no merit in it, did not amend it to add claims, and indeed withdrew its representation. Under those circumstances, Carter was not entitled to another appointment of counsel, stand-by or otherwise. *See Ford v. State*, 570 N.E.2d 84, 87 n.1 (Ind. Ct. App. 1991) (noting indigent petitioners have right to challenge any conviction or sentence by proceeding pro se; however, public defender representation need not be provided to inmate-petitioners either having no present need for relief or if state public defender, after review and investigation, finds proceedings are not meritorious and in the interests of justice), *trans. denied*; *see also Medlock v. State*, 547 N.E.2d 884, 887 (Ind. Ct. App. 1989) (concluding that post-conviction court did not err in denying petitioner's request for standby counsel).

III. Sufficiency of Findings and Conclusions

Carter contends:

> The Court's blanket adoption of the State's proposed findings is dangerously close to collusion. The Court did not look at the evidence presented during the course of the hearing when it issued those findings. Rather, the Court merely signed off on the State's conclusions. It did not make its own conclusions. This contention is further supported by the fact that Shelia [sic] Carlisle, a Judge who did not participate in the post-conviction process, also signed the State's finding of fact and conclusions of law, and termed herself the "presiding judge." While Judge Carlisle was the presiding Judge of the courtroom, she was not presiding over this particular case and had no authority to "validate" Judge [sic] Robinette's ruling by signing the proposed findings tendered by the State of Indiana.

Appellant's Br. at 9-10. He continues: "[t]he Appearance of impropriety Appears to violate the Judicial Canons." *Id*. at 10. Further, Carter claims it is "exceedingly difficult" to "understand the basis" of the court's decision. *Id*.

These issues exemplify the reason that multiple hearings occurred in Carter's case – educating a pro se litigant takes time. Our supreme court has instructed that a post-conviction court's wholesale adoption of one party's findings does not create bias, even though such practice is not encouraged. *See Prowell v. State*, 741 N.E.2d 704, 708-09 (Ind. 2001). The critical inquiry is whether the findings adopted by the court are clearly erroneous. *See id*.; *Woods v. State*, 701 N.E.2d 1208, 1210 (Ind. 1998). Here, the twenty-plus-page order was issued five months after the last of several evidentiary hearings, which spanned more than half a year. During that time, the court surely had ample time to consider the case. In his appellant's brief, Carter has not demonstrated that the court's findings are clearly erroneous or that the conclusions are incorrect; instead, he makes global assertions such as, "findings must communicate the basis upon which the petition is granted or denied sufficiently for review."[2] Appellant's Br. at 10. As such, he presents no reversible error in this regard.

---

[2] To the extent Carter attempts to challenge specific findings for the first time in his reply brief, he is too late. *See* Ind. Appellate Rule 46(C) ("The appellant may file a reply brief responding to the appellee's argument. No new issues shall be raised in the reply brief."). Notwithstanding his tardiness, we briefly touch on these arguments. Because the record from the original trial has not been provided to us, we cannot tell definitively if the autopsy report was introduced at his original trial. While the autopsy report was introduced on post-conviction, there is no indication that it is inconsistent with Dr. Pless's testimony or that it would have affected Carter's case. Thus, no prejudice has been shown. Also, during post-conviction hearings, Carter seemed to believe there was a second autopsy report that might support him. App. at 56-58. From what we can tell, there was no second report; instead, Carter seems to have been confused by the wording of the probable cause affidavit. *Id*. at 425 (Def's Exh. E). Contrary to Carter's assertion, the defense *did* present evidence to support the self-defense theory. We will delve into that in greater detail when we address the ineffective assistance contentions. We are equally unmoved by Carter's attempts to challenge the court's description of the victim's THC level as "low." Carter offered no explanation of "Delta-9 THC = 2.6 ng/mL" when he introduced the toxicology report during post-conviction (Exh. Q; PCR Tr. 209-16). Having made no attempt to use the toxicology report, Carter cannot now show prejudice in what is essentially a superfluous finding. Moreover, the fact that the autopsy states, "Toxicology – Blood volatiles negative" would seem to lend credence to the characterization of the victim's THC level as low. App. at 429.

As for Carter's confusion regarding judges, presiding judges, etc., we direct him to the Indiana Code sections concerning Marion County's court system. *See* Ind. Code §§ 33-33-49 through -34; *see also* Ind. Code §§ 33-23-5-1 through -13 (magistrates). William Robinette, Master Commissioner, heard Carter's post-conviction case. As per statute, Master Commissioner Robinette had the "powers and duties prescribed for a magistrate[.]" Ind. Code § 33-33-49-16(e). That same section states that a master commissioner "shall report the findings in each of the matters before the master commissioner in writing to the judge or judges of the division to which the master commissioner is assigned or as designated by the rules of the court." *Id*. Indisputably, the signatures of both Robinette and Presiding Judge Sheila Carlisle appear on the order denying Carter's petition for post-conviction relief. Contrary to Carter's belief, this is not error. *See also Williams v. State*, 724 N.E.2d 1070 (Ind. 2000) (discussing powers and duties of magistrates).

IV. Effective Assistance of Counsel

Carter challenges the effectiveness of both trial and appellate counsel. He contends that his trial counsel performed deficiently when presenting the self-defense claim and when addressing the testimony regarding the autopsy. He opines that the disciplinary action brought by Carter caused his defense counsel's poor performance.

A claim of ineffective assistance of trial counsel may be presented in post-conviction proceedings. *Benson v. State*, 780 N.E.2d 413, 418 (Ind. Ct. App. 2002), *trans. denied*. However, there is a strong presumption that counsel rendered effective assistance and made all significant decisions in the exercise of reasonable professional judgment, and the burden

falls on the defendant to overcome that presumption. *Id.* To prevail on a claim of ineffective assistance of trial counsel, Carter must satisfy a two-part test:

> First, the defendant must show that the counsel's performance was deficient by falling below an objective standard of reasonableness and the resulting errors were so serious that they resulted in a denial of the right to counsel guaranteed under the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced his defense. Prejudice is shown with a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. This reasonable probability is a probability sufficient to undermine confidence in the original outcome of the proceeding.

McKorker v. State, 797 N.E.2d 257, 267 (Ind. 2003) (citations omitted). In addition, our supreme court has stated, "[I]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice … that course should be followed." *Robinson v. State*, 775 N.E.2d 316, 319 (Ind. 2002).

When a defendant claims self-defense, he must establish that: (1) he was in a place where he had a right to be; (2) he did not provoke, instigate, or participate willingly in the violence; and (3) he had a reasonable fear of death or great bodily harm. *Randolph v. State*, 755 N.E.2d 572, 576 (Ind. 2001). The State must disprove, beyond a reasonable doubt, at least one element of self-defense. *See id*. The State may meet this burden by "rebutting the defense directly, by affirmatively showing that the defendant did not act in self defense, or by simply relying upon the sufficiency of its evidence in chief." *Miller v. State*, 720 N.E.2d 696, 700 (Ind. 1999). The amount of force used to protect oneself must be proportionate to the urgency of the situation. *Hollowell v. State*, 707 N.E.2d 1014, 1021 (Ind. Ct. App. 1999). Where a person uses more force than is necessary under the circumstances, the right of self-

defense is extinguished. *Id*.

At trial, Carter testified that he was acting in self-defense during the altercation with Stewart, the victim. PCR Tr. at 131- 32. Thus, at trial, defense counsel did present some evidence of self-defense. Because the victim was the only other adult present during the fight, it was difficult for the defense to offer additional witnesses to corroborate Carter's version of the fight. That said, another witness recounted Carter's description of the altercation: Carter "stated that he had been in an argument with [the victim] and at some point she had picked up a knife and was swinging it at him, and he was able to position himself to where he could, for lack of a better term, choke her, put her in a head lock to keep her from cutting or stabbing him." *Carter*, slip. op. at 5 (quoting R. 325, testimony of lieutenant who interviewed Carter). Presumably hoping to bolster his self-defense claim by showing that Stewart was violent, Carter requested that a "voluminous number of people" be interviewed. PCR Tr. at 138-39. In response, defense counsel had an investigator interview "every witness" identified by Carter. *Id*. In the end, no additional witnesses were called by the defense to testify regarding the self-defense theory.

Deciding which witnesses to call is a matter of trial strategy. *Brown v. State*, 691 N.E.2d 438, 447 (Ind. 1998). Absent a clear showing of prejudice, we will not declare counsel ineffective for failing to call a particular witness. *Ben-Yisrayl*, 729 N.E.2d at 108. Here, Carter faults his trial counsel for not calling his mother and brother as witnesses. It is unlikely that the type of evidence Carter sought would have been permitted. Again, Indiana Evidence Rule 405 permits proof of a victim's violent character by reputation or opinion

testimony, not by prior bad acts. Direct testimony of prior bad acts to show a victim's violent propensities is permissible only on cross-examination of a character witness. Ind. Evidence Rule 405(a). Moreover, it is entirely possible that defense counsel believed their testimony would do more harm than good and/or, because of their relationship with Carter, would be suspect. Defense counsel did, however, reiterate self-defense in his closing statement. In sum, Carter has not shown deficient performance or prejudice in his counsel's choice of witnesses to prove self-defense.

As for Carter's allegations that his counsel should have introduced the actual autopsy report during his original trial, we do not see how it would have helped his self-defense argument. Dr. Pless, Director of Pathology and forensic pathologist, was present during the autopsy and was one of two physicians who signed Stewart's autopsy report. Dr. Pless testified at the original trial. Thus, he was available to explain, expound upon, and clarify the same information that would have been found in writing in the autopsy report. During a post-conviction hearing, defense counsel testified that "he would have detected an inconsistency between the pathologist testimony and the autopsy report … if there was an inconsistency of substance that had relevance to [Carter's] case." App. at 58.

In light of Dr. Pless's testimony, defense counsel may very well have determined that the autopsy report would have been redundant. Or, counsel could have reasonably determined that the report's detailed description of the various injuries, anatomic findings, etc. would do more harm than good for Carter's self-defense argument. For instance, it is doubtful that a fact-finder, who read "Blood volatiles negative" under the heading

"Toxicology" on page one of the autopsy report, would have been persuaded that Stewart was under the influence and dangerous. If anything, this would seem to cut against Carter's theory that the victim was high on drugs, thereby justifying his "fear" and his actions. Similarly, it is highly doubtful that a half-page toxicology report specifying "negative" results for a variety of drug screens[3] run on the victim would have helped Carter's self-defense argument. As for defense counsel's "failure" to hire Dr. Peters or some other medical expert to dispute Dr. Pless, given the aforementioned circumstances, we are at a loss to see how a second expert would have made a difference.[4] Counsel is not deficient for failing to perform useless acts.

Regarding the complaint filed by Carter against his counsel, the Disciplinary Commission of the Supreme Court reviewed it, "determined that it does not raise a substantial question of misconduct that would warrant disciplinary action," and dismissed it. App. at 423 (Def.'s Exh. D). In judging his own performance, Carter's trial counsel used the words "fair" and "competent." App. 10. He specified that he provided the best defense that

---

[3] The omitted toxicology report did contain measures of Delta-9 THC and Delta-9 Carboxy THC, but there is no indication that either of the amounts was significant.

[4] Within his brief, Carter states:

> The State's expert witness, Dr. John Pless, testified that in his opinion, two possible causes of death were: (1) if the victim was rendered unconscious, it is possible that would could [sic] have held enough to cause death; and (2) deep in the larynx, there's evidence that this force was transferred completely through the neck to the back of the larynx which butts up against the spine, so the larynx was compressed against the spine.

Appellant's Br. at 12. This excerpt is difficult to make sense of, and Carter includes no citation. Thus, we cannot tell if this excerpt is an exact quote or paraphrase. Even assuming this is a word-for-word reproduction of a portion of a transcript, without the context, we cannot say this is inconsistent with the ultimate cause of death, strangulation.

he could all along – regardless of Carter's attempt to gain new counsel and despite Carter's filing of a disciplinary complaint. *Id*. at 24, 30. When asked if he had a conflict of interest with Carter, his defense counsel answered "no" and noted that he saw no legitimate basis to disqualify himself. *Id*. at 30. No evidence has been presented to demonstrate that trial counsel was motivated to perform poorly by an unsuccessful disciplinary complaint filed by Carter. More importantly, Carter simply has not shown deficient performance that prejudiced the outcome of his case.

Turning to Carter's challenges to the effectiveness of his appellate counsel, we note that we review ineffective assistance of appellate counsel using the same standard applicable to claims of trial counsel ineffectiveness. *Ben-Yisrayl*, 729 N.E.2d at 106. The defendant must show that appellate counsel was deficient in his performance and that the deficiency resulted in prejudice. *Id*. Prejudice will be found to exist when "there is a reasonable probability that the result of the proceeding would have been different but for defense counsel's inadequate representation." *Cook v. State*, 675 N.E.2d 687, 692 (Ind. 1996); *see also Imel v. State*, 830 N.E.2d 913, 917-18 (Ind. Ct. App. 2005), *trans. denied*. Ineffective assistance claims at the appellate level of proceedings generally fall into three basic categories: (1) denial of access to an appeal; (2) waiver of issues; and (3) failure to present issues well. *Bieghler v. State*, 690 N.E.2d 188, 193-95 (Ind. 1997). Carter's arguments fall into the third and second categories respectively.

Carter asserts that appellate counsel did not raise the "pertinent portions of the trial record testimony which is why the Indiana Court of Appeals was limited to the State

witness's version of the facts that no uniform security was outside [Carter's] door at Wishard hospital, so he was free to leave and not illegally detained." Appellant's Br. at 15. Stated otherwise, Carter contends that his appellate counsel failed to adequately present the following issue: whether the trial court properly denied his motion to suppress his statements. Again, it is difficult for us to address this issue without the original trial transcripts. However, it appears from our review of the brief that Carter filed on direct appeal, his appellate counsel did specifically argue that security was outside his door. *See* PCR Exh. X (Appellant's Br. at page 19; "a reasonable person would not have felt free to leave the hospital when he had just brought his girlfriend's dead body there and there were security or police officers outside the room he was in [TR. 9, 32, 232-233]."). Having read Carter's appellant's brief, the panel on appeal was certainly aware that security was posted outside Carter's hospital room. However, security could very well have been there for the protection of the persons inside the room, which would be consistent with Sergeant Turner's testimony that Carter was free to go. Thus, appellate counsel's attempt to question the denial of the motion to suppress, while not ultimately successful, was not deficient performance.

Carter's last contention is that appellate counsel was ineffective when he "failed to present a significant and obvious issue on the pre-Appeal form[.]" Appellant's Br. at 16. Ineffectiveness is "very rarely found" in these types of cases because "the decision of what issues to raise is one of the most important strategic decisions to be made by appellate counsel." *Bieghler*, 690 N.E.2d at 193. Moreover, "experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on

appeal and focusing on one central issue if possible, or at most a few key issues." *Id.* at 193-94. To establish this type of ineffectiveness, Carter must demonstrate that the unraised issue was significant and obvious from the face of the record, that it was "clearly stronger" than the issues that were raised, and that there is a reasonable probability that the outcome of the direct appeal would have been different. *Reed v. State*, 856 N.E.2d 1189, 1195 (Ind. 2006). In the one paragraph Carter devotes to this argument, he not only fails to show that the unraised issue was significant, obvious, and clearly stronger than the issues raised by appellate counsel, but he also never even mentions what the unraised issue was. This falls far short of the requirements of *Bieghler* and *Reed*. In sum, Carter has not met the standard required to show ineffective assistance of either trial or appellate counsel.

Affirmed.

DARDEN, J., and MAY, J., concur.